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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN DEVON CORBRAY, Defendant and Appellant.	H037666 (Santa Cruz County Super. Ct. No. F21115)

Defendant Adrian Devon Corbray was convicted and sentenced to four years in prison on five counts of pimping and pandering. On appeal he contends that he should receive additional conduct credit for presentence confinement pursuant to the October 2011 amendments to Penal Code section 4019 (§ 4019), which took effect after his offenses were committed but before judgment was entered against him. He acknowledges that the amendments included a declaration that they would operate only prospectively, but he seeks to invalidate that declaration on the ground that it violates his right to equal protection of the laws. The Supreme Court has recently held that a defendant seeking the benefit of a previous similar amendment could not satisfy the first requirement of an equal protection challenge with respect to credit earned before the effective date of the amending statute, because he was not situated similarly to those who earned credit after the effective date of the liberalizing amendment. (*People v. Brown*

(2012) 54 Cal.4th 314, 328-329 (*Brown*).) This decision clearly disposed of defendant's argument insofar as it concerns credit earned prior to the effective date of the 2011 amendments. Having asked the parties to brief the narrower question whether the decision also disposed of his claim as it concerned time in confinement between the effective date and sentencing, we have concluded that we are constrained by existing authority, including our own decision in *People v. Kennedy* (2012) 209 Cal.App.4th 385 (*Kennedy*), to reject defendant's claim in its entirety. We will therefore affirm the judgment.

BACKGROUND

Defendant was charged on July 28, 2011, with (1) pimping a minor over the age of 16 (Pen. Code, § 266h, subd. (b)(1)), (2) pandering a minor over the age of 16 (Pen. Code, § 266i, subd. (b)(1)), (3) simple pimping (Pen. Code, § 266h, subd. (a)), (4) simple pandering (Pen. Code, § 266i, subd. (a)(1)), and (5) conspiracy to commit pimping and pandering (Pen. Code, § 182, subd. (a)(1). The offenses were alleged to have occurred between April 1 and June 30, 2011. On September 11, 2011, defendant entered a plea of no contest to all charges. On October 21, 2011, he was sentenced to the middle term of four years on count 1, with other counts running concurrently or stayed under Penal Code section 654. The offenses of pimping a minor and pandering a minor also triggered a requirement, and the court duly ordered, that he register as a sex offender. (Pen. Code, § 290, subd. (c), citing Pen. Code, §§ 266h, subd. (b), and 266i, subd. (b).) The court allowed presentence confinement credit of 178 days actual times served, plus 88 days conduct credit under section 4019.

Defendant filed this timely appeal.

DISCUSSION

I. *Custody Before Effective Date*

The court calculated defendant's credits for presentence confinement using the formula in effect from September 28, 2010, through September 30, 2011. At that time Penal Code section 4019, subdivision (f), allowed two days conduct credit for every four days actually served in county jail prior to sentencing. (Stats. 2010, ch. 426, § 2.) This meant that a person in defendant's position would receive six days of total credit against his sentence (i.e., six days' reduction in the time remaining to be served) for every four days of pre-sentence confinement. As to most prisoners, however, that formula was superseded by a more liberal formula provided by 2010 amendments to Penal Code section 2933, subdivision (e)(1).[1] (Stats. 2010, ch. 426, § 1.) Prisoners subject to that formula earned one day of conduct credit for every day they were actually confined—a straight two-to-one ratio. The enacting statute declared, however, that this formula was inapplicable, and the six-for-four formula set forth in section 4019 would continue to govern, as to certain classes of prisoners. (Former Pen. Code, § 2933, subd. (e)(3); Stats. 2010, ch. 426, § 1.) The excluded classes including prisoners required, as defendant was, to register as sex offenders. (*Ibid*.)

Effective October 1, 2011, section 4019 was amended to provide a formula of two days' credit for every two days served. (Pen. Code, § 4019, subd. (f), as enacted by Stats.

[1] Courts have adopted a variety of shorthand designations to refer to the varying formulae for calculating confinement credits. In our view, the least ambiguous and most mathematically sound approach is to describe each formula as a ratio of total credit allowed to actual days served. Under this approach, defendant's credits were calculated under a six-for-four formula, while he contends that they should have been determined under a two-for-one formula. Of course it is tempting to further reduce the 6:4 ratio to 3:2, but this would yield inaccurate results because the statute only allows conduct credit based on four-day units of time actually served. Thus a prisoner in jail for 10 days would receive only 14 days total credit, including four days conduct credit based on two four-day units actually served. Under a three-to-two ratio, the same prisoner would receive 15 days credit, including five days for conduct.

2011, 1st Ex. Sess., ch. 12, § 35.) At the same time, section 2933 was amended to omit any reference to presentence confinement credits. (Stats. 2011, 1st Ex. Sess., ch. 12, § 16.) The net effect was to prescribe a single formula for all prisoners, albeit one slightly less liberal than was found in the prior version of section 2933.[2] The latter change would benefit defendant, if applicable to him, by allowing credit under a two-for-two rather than two-for-four formula, roughly doubling his custody credits and increasing his total credit for presentence confinement by about one-third. The Legislature, however, expressly declared the 2011 amendment to be prospective in operation: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a *crime committed on or after* October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h); italics added.)

Defendant's original claim before this court was that he was entitled to the benefit of the October 2011 formula for the entire period of his presentence confinement, i.e., 178 days' credit for time actually served, plus 178 days' conduct credit, for a total of 356 days. He contended that for purposes of the relevant statutes he was situated similarly to prisoners who committed their offenses after the 2011 amendments took effect. The clause declaring the statute prospective-only in operation, he contended, denied his right to equal protection of the laws, and was void. In a supplemental opening brief he contended that the disparity in treatment failed both the "rational basis" standard of judicial review and the more searching "strict scrutiny" standard, to which he contended it was subject because the effect of the statute was to impair his interest in

[2] The 2011 formula is less liberal the 2010 formula in that it does not grant conduct credit for odd days in custody. Under the 2011 version of section 4019, a defendant spending five days in jail will receive four days conduct credit, whereas under the 2010 version of section 2933 he would have received five.

personal liberty by lengthening his time of incarceration relative to others similarly situated.

These arguments were largely disposed of in *Brown, supra*, 54 Cal.4th 314, where a defendant sentenced in 2007 sought additional conduct credit based on amendments that took effect in January 2010. As most pertinent here, the Supreme Court rejected the defendant's equal protection on the ground that, having already completed his presentence confinement when the liberalizing statute took effect, the defendant was not similarly situated to those who spent time in presentence confinement after that date. The threshold requirement for an equal protection claim, wrote the court, " ' "is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." ' [Citation.] 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' [Citation.]" (*Id.* at p. 328, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Adopting language from *In re Strick* (1983) 148 Cal.App.3d 906, 913, the court wrote, " 'The obvious purpose of the new section . . . is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison. . . . Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.' " (*Brown, supra*, at p. 329.)[3]

[3] This discussion echoed the court's earlier discussion of a conceptually related point, i.e., that the liberalization in custody credits did not reflect the kind of mitigative legislative intent that would justify its extension to prisoners finally convicted before its effective date under the holding of in *In re Estrada* (1965) 63 Cal.2d 740. That case made an exception to the general presumption that penal statutes apply only prospectively. The exception, however, "was founded on the premise that ' "[a] legislative mitigation of the penalty *for a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" ' (*Id.* at p. 745, italics added) and the corollary

Defendant's challenge is clearly foreclosed by *Brown* insofar as he seeks additional credit for time in custody prior to the effective date of the amending statute. Here as there, the central statutory objective of providing an incentive for good behavior cannot be served with respect to confinement that had already occurred when the statute took effect. It follows that under *Brown*, defendant is not situated similarly to persons earning conduct credits after the effective date of the 2011 amendments to section 4019.

II. *Custody After Effective Date*

We asked the parties to brief the effect of *Brown*, as well as a footnote in *People v. Lara* (2012) 54 Cal.4th 896, 906, footnote 9 (*Lara*), as they might bear on time defendant spent in jail—21 days, to be precise—between the effective date of the 2011 amendments and his sentencing. Specifically we asked the parties (1) whether *Brown* applies to "disparities in treatment for confinement occurring after that date," i.e., October 1, 2011; (2) if not, whether those disparities violate equal protection; and (3) whether the cited footnote in *Lara* "constitute[s] binding authority that disparate treatment for confinement after October 1, 2011, is mandated by the October 1, 2011, amendment and that such treatment does not violate equal protection."

We find it unnecessary to consider the first question because we believe the dictum in *Lara*, together with other authority issued since this matter first became before us, preclude our adopting defendant's equal protection argument even with respect to the

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inference that the Legislature intended the lesser penalty to apply to crimes already committed." (*Brown, supra*, 54 Cal.4th at p. 325, fn. omitted.) This conception did not apply to a liberalization in credit calculations: "[A] statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense . . . . Former section 4019 does not alter the penalty for any crime; a prisoner who earns no conduct credits serves the full sentence originally imposed. Instead of addressing punishment for past criminal conduct, the statute addresses *future conduct* in a custodial setting by providing increased incentives for good behavior." (*Ibid.*) Thus the rationale on which *Estrada* rested "does not inform our understanding of a law that rewards good behavior in prison." (*Id.* at p. 325, fn. omitted.)

time he spent in presentence custody after the effective date of the 2011 amendments. First, we observe that this court has recently rejected such a challenge in *Kennedy*, *supra*, 209 Cal.App.4th 385. Another court, while rejecting what it perceived as one of the holdings in that case, also refused to find a denial of equal protection. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 53-54.) And the Supreme Court's comments in *Lara*, while perhaps not binding on us as a strict matter of stare decisis (see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, pp. 572-574 [binding precedential effect is limited to *ratio decidendi*, the actual rule of decision]), certainly furnish an indication of that court's views with which we are disinclined to take issue, particularly in view of our own holding in *Kennedy*, *supra*, 209 Cal.App.4th 385.

In *Lara* the Supreme Court reviewed a decision of this court in which the issue, as framed by the high court, was whether a sentencing court had the power to disregard a prior conviction that would otherwise disqualify the defendant from receiving increased presentence conduct credits under section 4019. (See *Lara, supra,* 54 Cal.4th at pp. 899, 900.) That question in turn depended on whether the facts triggering the disqualification had to be "charged and alleged." (*Id.* at p. 901.) The court concluded that they did not. (*Id.* at pp. 901-906.) Therefore, the trial court did not have the power to disregard them in calculating the defendant's credits under section 4019, and our judgment, directing the trial court to consider exercising such power, was reversed. (*Id.* at p. 907.)

We took note of *Lara* in the present context because the court commented in a footnote on the effect of the 2011 amendments to the precustody credit formula: "Today local prisoners may earn day-for-day credit without regard to their prior convictions. (See § 4019, subds. (b), (c) & (f), as amended by Stats. 2011, ch. 15, § 482.) This favorable change in the law does not benefit defendant because it expressly applies only to prisoners who are confined to a local custodial facility '*for a crime committed on or after October 1, 2011*.' (§ 4019, subd. (h), italics added.)." (*Lara, supra,* 54 Cal.4th at

p. 906, fn. 9.) The court went on to reject an equal protection challenge to this limitation on the grounds that it was foreclosed by the decision in *Brown*. (*Ibid*.) This treatment obliquely repudiated an earlier suggestion by this court, in yet another case, that the 2011 amendments might be construed to differentiate only on the basis of the time when the custody occurred and not the date of the offense—another decision of which the Supreme Court granted review, but which remains pending there. (*People v. Olague* (2012) 250 Cal.App.4th, review granted Aug. 8, 2012, S203298.) That case may provide a suitable vehicle if the court wishes to revisit the effect of the 2011 amendments on persons in defendant's position. Pending such further guidance, and given the weight of authority adverse to defendant's position, we must conclude that the trial court did not err by calculating his custody credits at the earlier rate for the entire time of his presentence confinement.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.